ORIGINAL

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON D.C.

In the Matter of	)	
	)	
Standardized and Enhanced	)	MM Docket No. 00-168
Disclosure Requirements for	)	
Television Broadcast Licensee	)	
Public Interest Obligations	)	

To: The Commission

JOINT REPLY COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS

Alaska Broadcasters Association, Arizona Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Georgia Association of Broadcasters, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/District of Columbia/Delaware Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee

Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (each, a "State Association" and collectively, the "State Associations"), by their attorneys, and pursuant to Sections 1.415 and 1.419 of the Commission's Rules and Regulations, hereby jointly reply to the Comments that have been filed in response to the above-captioned *Notice of Proposed Rule Making* (the "*NPRM*"), MM Docket No. 00-168.

I. INTRODUCTION

The State Associations recognize the obligation that television broadcasters have to serve the public interest. But, as the State Associations pointed out in their Comments in this proceeding filed December 18, 2000, there is no evidence that broadcasters are not meeting this obligation. Since 1984, analog television broadcasters have used the format of quarterly Issues/Programs lists to reflect the significant community issues that they have ascertained and to set forth representative programs that they are airing to meet those ascertained problems, needs and interests.[1] These obligations will continue in the digital world. There is no evidence of widespread dissatisfaction or confusion with the present practice. The NPRM provides only isolated anecdotal examples to support a change in existing policy, and the comments filed by those who support the proposals in the NPRM fail to provide a reasoned justification for such a change.

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[1] Radio broadcasters have prepared quarterly Issues/Programs lists and placed them in their public inspection files since 1981.

The transition to digital television does not justify imposing increased regulatory obligations on television broadcasters. In his Separate Statement to the NPRM, then Commissioner (now Chairman) Powell noted that the NPRM "seeks comment on a number of matters which have no nexus with the transition to digital" and he questioned whether this is an appropriate proceeding to raise these issues. The State Associations share Chairman Powell's concerns. Furthermore, given the fact that the conversion to digital has not been problem-free and has yet to fully develop, the Commission should wait until digital television is widely available before deciding whether any additional regulatory burdens are necessary.

The arguments that have been advanced in support of the proposals in the NPRM are "Orwellian." The proponents argue that the current Issues/Programs lists lack "uniformity and consistency;" that programming should "fit[] within the specified groups;" that the same programs should "not be[] listed under multiple categories; that the standardized form should indicate what foreign language translations of programming are available and the different languages spoken in the community; that the lists should identify what audience the broadcaster is trying to serve; and that the Commission should consider all of this information at license renewal time. [2]

As the State Associations' Comments demonstrated, adoption of the proposed standardized form would violate the Administrative Procedure Act ("APA") and raise serious First Amendment concerns. The proposed standardized disclosure form is burdensome, requiring licensees to count categories of programming that they have aired every quarter. The requirement that licensees provide a narrative description of their ascertainment of community

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[2] *See, e.g., Comments of People for Better TV and Comments of Office of Communication, Inc. of the United Church of Christ, et al. ("UCC")*

needs and interests would amount to reinstating a regulatory regime that the Commission eliminated in the early 1980s because it was unproductive and unduly burdensome. The proposed disclosure form is neither content-neutral nor narrowly tailored. It focuses on specified categories of programming and requires numerous explanatory exhibits. It also includes information that is already available to the public in a station's public inspection files as well as in Commission files. The requirement that a broadcaster maintain its public file, amounting to thousands of pages, on its website would be extremely burdensome and expensive and would duplicate material already in the broadcaster's public inspection file and on the Commission's website.

II. DISCUSSION

A. There Is No Justification For Adopting The Proposed Standardized Disclosure Form

Neither the NPRM, nor the Comments of those who desire adoption of a standardized form, have presented evidence that would support this new increased regulatory burden. In 1984, the Commission eliminated the requirement of formal ascertainment procedures and its then existing quantitative programming requirements and adopted the quarterly Issues/Programs lists requirement.[3] In view of the substantial record evidence that was developed to support the deregulatory efforts made in 1984 and the dearth of any evidence that the 1984 reforms were a failure, adoption of the standardized form would be an arbitrary and capricious act in violation of APA requirements.

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[3] *Report and Order, The Revision and Commercialization Policies Ascertainment Requirements, and Program Log Requirements for Commercial Television stations, 98 FCC 2d 1076 (1984)*(the "1984 Report and Order").

The central thesis of those who support the imposition of a standardized form is that "the current Issues/Programs lists lack consistency and uniformity." (UCC Comments at pp. 3, 16; People for Better TV at p. 6). However, these commentators have not demonstrated that uniformity is necessary or that there is any widespread deficiency in existing Issues/Programs lists. Communities do not all have the same problems and broadcasters do not all air the same programming. The Commission has never dictated any specific format for the quarterly lists nor does a specific format appear necessary. If individuals have specific complaints about a specific station, they should address their concerns to that station. There is no need to impose standardization on the entire industry. Indeed, if there were uniformity among Issues/Programs lists, there would undoubtedly be complaints that broadcasters were sharing lists or otherwise not meeting their responsibilities.

The Office of Communication of the United Church of Christ ("UCC") claims that the standardized form is a "means for allowing public aspirations to help influence future programming." (UCC Comments, p. 2). But UCC does not explain why the public cannot now influence programming decisions made by stations, either by writing letters to broadcasters and/or programmers and/or by refusing to watch programs they do not like.

UCC further argues that the standardized form "promotes the First Amendment rights of the community," (UCC Comments at pp. 15-16), but UCC does not explain the nature of this supposed First Amendment right nor supply any precedent supporting such a right. In 1998, the United States Supreme Court held that "[i]n the case of television broadcasting, ... broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that

stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations."[4]

Those who support the NPRM's proposal want the standardized form to be all things to all people. They have presented a veritable wish-list of requirements. For instance, UCC wants each broadcaster to air six hours of public affairs programming per week although it does not identify why six hours on each station is necessary, why public affairs programming should supplant news programming, or how television licensees with long-term network affiliation agreements and other programming contracts can meet this requirement. The proposed standardized form not only seeks answers to questions about certain program categories, it also requires at least eight separate exhibits providing additional material. People for Better TV want broadcasters to list by category not just representative programs but every program that they have aired along with the time, date and duration of their programs. (People for Better TV Comments at p. 7). This would be a daunting task involving many hours of personnel time. People for Better TV also wants broadcasters to list programming that serves under-served viewers, indicate the demographics of the community, and explain how the programming meets each segment's needs. (Id.at p. 8). In addition, they want the disclosure forms to list foreign-language programming and closed-captioned programming and programming that is video-described. People for Better TV wants digital broadcasters to describe all of the services they offer and to certify and describe their compliance with federal consumer protection guidelines. (Id. pp. 8-9). While many broadcasters have demonstrated the burdensome nature of all of these requirements (*see, e.g.* Comments of The Walt Disney Company at pp. 8-9) the commentators

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[4] *See Arkansas Educ. Television v. Forbes,* 523 U.S. 666, 675 (1998).

who support these new requirements have not evaluated the manpower that would be necessary to perform these tasks nor the expense the requirements would involve. Nor has the Commission performed any kind of analysis of the costs and purported benefits of its proposals.

The proposed form also seeks certain information that is already publicly available. Item 21 on the form, "Community Service," calls for licensees to list in a separate exhibit "any community service programs, community outreach, or other similar non-broadcast activities directed to serving the community of license undertaken during the past three months." However, licensees already describe the non-broadcast efforts they take to serve children in their Form 398 reports. The proposed form also contains questions (Items 22, 23 and 24) relating to local marketing agreements and time brokerage agreements. However, these agreements are required to be placed in the public inspection file and filed with the FCC so the requested information is redundant and unnecessary.

The NPRM tentatively concluded that the standardized disclosure form should include information on broadcasters' provision of closed captioning and video description. Actually, including this information on the standardized form at the end of each quarter would not benefit the disabled since the form would be prepared after the fact. What those supporting this proposal appear to want is a separate listing or posting in advance of all programming that would be closed captioned and video described.

B. The Proposed Standardized Form Would Violate The First Amendment

The proposed standardized form in its usual implementation would place the Commission squarely back in the midst of evaluating ascertainment efforts, establishing quantitative programming requirements and even evaluating programming qualitatively. For example, the form calls for licensees to air a minimum quantity of programming to meet the needs of

"underserved" communities and requires each licensee to set forth a representative sample of programs that aired during the preceding three months that met such needs. It makes no sense for every station in a given community to be programming to the same subsets of people, particularly when many communities have television stations that engage in specialized programming. And one can easily imagine how the Commission would be drawn into a contest at renewal time as to whether a given station is programming sufficient programming, both quantitatively and qualitatively, for a particular community group. This is exactly the kind of inquiry that the Commission expressly eschewed in 1984. *See 1984 Report and Order, supra.*¶29.

There is no question that the standardized form with its quantitative minimums and requirement for explanations will chill broadcasters' speech and require broadcasters to be politically sensitive as to what kind of programming a particular administration desires. The proposed form already discriminates in favor of some types of speech to the exclusion of other types. For example, the proposed form contains specific categories of programming, i.e., news, public affairs, political civic discourse, programming for underserved communities, etc. But the form omits other programming such as sports, religion, cultural programs, documentaries etc. Prior to 1984, the Commission's rules required certain program categories to be logged and those categories included, *inter alia,* "religious" programming. *See* 47 C.F.R. Section 73.1810(d)(v). In order to satisfy the Commission, not to mention public interest groups, licensees would have to direct their energies to broadcasting the specific kinds of programming that the Commission wants.

As the Court of Appeals for the D.C. Circuit has recently remarked, " a regulatory agency may be able to put pressure upon a regulated firm in a number of ways, some more subtle than

others. The Commission in particular has a long history of employing: 'a variety of *sub silentio* pressures' and 'raised eyebrow' regulation of program content.'" [5] The programming categories set forth in the proposed standardized disclosure form amount to subjective determinations by the FCC as to what programs it wants broadcasters to air without any regard for what a given community wants. The process will indisputably chill broadcasters' speech by forcing them to cater to the programming desires of the FCC to whom they must look for renewal of their licenses.

IV. The Proposal That Broadcasters Place Their Entire Public Inspection Files On Their Websites Is Extremely Burdensome And There Is No Countervailing Benefit.

The NPRM proposes that each licensee must, each quarter, post the proposed standardized form and the other contents of its public inspection file on its website or its state broadcasters association's website. It is the Commission's belief that this requirement "will not be unduly burdensome" but the NPRM contains no support for this "belief."[6]

In any event, the NPRM's proposal that licensees place their entire public inspection files on their websites or on the websites of the state associations is incredibly burdensome and unnecessary. As set forth in a number of the comments that have been filed,[7] a typical station's public inspection file includes thousands of documents, many of which were not generated in

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5 *MD/DC/DE Broadcasters Ass'n v. FCC*, No. 00-1094, 2001 U.S. App. LEXIS 570, at *13 (D.C. Cir. Jan. 10, 2001) (quoting *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978).

6 Assuming *arguendo* that the Commission has jurisdiction over the Internet and could require that specific content be included on a licensee's website, the Commission certainly has no authority over the websites of unregulated third parties such as state broadcasters associations.

7 *See*, e.g., Comments of the National Association of Broadcasters; Joint Comments of Benedek Broadcasting Corporation, Lin Television Corporation, Post-Newsweek Stations, Inc., and Raycom Media, Inc.

electronic form and include such materials as engineering, contour maps etc. Stations and/or state associations would have to spend substantial sums to convert all of this material to electronic form and place it on their websites.

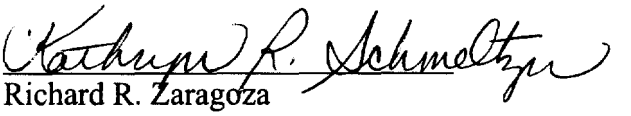
The purported benefits of the Commission's proposal appear minimal. Members of the community can visit a station's public inspection file to obtain information. Stations have never been required to make material available to those who do not reside in their community. The proposal also raises privacy concerns. People who send letters to stations may not want those letters placed on websites for all to see. Indeed, members of the public may be dissuaded from writing or e-mailing stations if they know that what they send will be placed on a station website. As electronic filings with the FCC increase, much of the information that is now in the public file will be available on the FCC website. There is no reason why it is also necessary that they be on a station website.

III. CONCLUSION

Accordingly, for the reasons set forth above, the proposed rules are unjustified, unwarranted and unduly burdensome. This rulemaking proceeding should be terminated.

Respectfully submitted,

The Named State Broadcasters Association

By: 
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